Supreme Court, U.S.
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No. _____

# Supreme Court of the United States

October Term, 2005

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CARRIE HAMILTON, ALICE MILES, AND RICHARD MILES,

*Petitioners,*

versus

UNITED STATES OF AMERICA,

*Respondent.*

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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## Petition for Writ of Certiorari

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## Questions Presented

1. Unless a defendant waives a jury in writing, Federal Criminal Rule 23(a) requires that "trial must be by jury." After the Fifth Circuit vacated Petitioners' original sentences for serious financial fraud offenses, the trial court again imposed enhanced, mandatory Guidelines sentences, rejecting Petitioners' objections that none of the mandatory sentencing enhancements had been admitted by Petitioners or found beyond a reasonable doubt by a jury, in violation of Rule 23(a), the Sixth Amendment, and *Blakely v. Washington*, 542 U.S. 296 (2004). The Court of Appeals affirmed, holding that the sentences were unconstitutional and violated the Sixth Amendment and *United States v. Booker,* 543 U.S. 220 (2005), and that Petitioners had correctly objected in the trial court on those grounds before resentencing, but that Petitioners had waived those objections by not making them at the first sentencing and on the first appeal; and that there was no plain error under Federal Criminal Rule 52(b).

Did the Fifth Circuit's holding violate Rule 23(a) and the Fifth and Sixth Amendments?

2. Does the *ex post facto* clause of the Constitution, or the *ex post facto* component of the Fifth Amendment's due process clause, condemn "reasonable" discretionary sentences under *Booker* that are more onerous than the unenhanced, constitutionally permissible sentences that would have been imposed under the mandatory Guidelines?

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## Opinions Below

The Fifth Circuit's opinions are reported. *United States v. Miles*, 360 F.3d 472 (5 Cir. 2004), *appeal following remand*, *United States v. Hamilton*, 440 F.3d 693 (5 Cir. 2006) (Pet. App. A-1).

## Jurisdiction

The Fifth Circuit's opinion and judgment are dated February 16, 2006. The Court of Appeals denied Petitioner Richard Miles' timely petition for panel rehearing on March 21, 2006 (Pet. App. A-14). This petition for certiorari was filed within 90 days thereafter and is timely.

The District Court had criminal jurisdiction under 18 U.S.C. § 3231. The Fifth Circuit had appellate jurisdiction under 28 U.S.C. § 1291. The Supreme Court has certiorari jurisdiction under 28 U.S.C. § 1254(1).

## Constitutional and Statutory Provisions

This case involves the Sixth Amendment's guarantee of trial by jury, the *ex post facto* clause of the Constitution, the *ex post facto* component of the Fifth Amendment's due process clause, and Rule 23(a) of the Federal Rules of Criminal Procedure:

> **Rule 23. Jury or Nonjury Trial**
>
> **(a) Jury Trial.** If the defendant is entitled to a jury trial, the trial must be by jury unless:

(1) the defendant waives a jury in writing;

(2) the government consents; and

(3) the court approves.

**Statement of the Case**

In November 2000 a Houston federal court jury convicted Petitioners Richard Miles, his wife Alice Miles, and his sister Carrie Hamilton of serious financial fraud offenses involving Medicare. In December 2001 the trial court imposed lengthy, enhanced prison sentences on each Petitioner under the mandatory U. S. Sentencing Guidelines.

The sentencing enhancements used in calculating Petitioners' first mandatory Guidelines sentences were not admitted by Petitioners or found beyond a reasonable doubt by the jury. Petitioners did not raise that constitutional defect in their initial sentencing in the trial court. Petitioners never waived a jury in writing in the manner required by Federal Criminal Rule 23(a).

On their first appeal, Petitioners did not attack the constitutionality of their enhanced, mandatory Guidelines sentences on Sixth Amendment grounds. The Fifth Circuit reversed the convictions of Carrie Hamilton and Alice Miles for money laundering promotion and making illegal Medicare kickbacks and affirmed their convictions for health care fraud, mail fraud, and conspiracy. *United States v. Miles*, 360 F.3d 472 (5 Cir. 2004). The Court of Appeals affirmed Richard Miles' convictions for mail fraud and health care fraud. The Court of Appeals

vacated all sentences of all Petitioners and remanded the case for resentencing because of the trial court's mistaken determination that Medicare was a "financial institution," a sentencing enhancement under the mandatory Guidelines that affected calculation of all sentences.

Following remand, the U. S. Probation Department prepared a "Supplement to the Presentence Report." The Supplement enumerated a number of mandatory sentencing enhancement factors that the jury did not find beyond a reasonable doubt and that Petitioners had not admitted, including the amount of the financial loss from their crimes, the extent of Petitioners' alleged involvement in the fraud, and their alleged perjury at trial. All of those enhancements had been used to calculate the sentences that the Fifth Circuit vacated.

Several weeks before Petitioners' resentencing, the Supreme Court decided *Blakely v. Washington*, 542 U.S. 296 (2004). "There is no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue in [*Blakely*]." *United States v. Booker*, 543 U. S. 220, 233 (2005). *Blakely* and *Booker* govern cases pending on direct review and not yet final. *Booker*, 543 U.S. at 268. This is such a case.

Before resentencing, as authorized by Federal Criminal Rule 32(f), all Petitioners filed additional written objections to the Supplement to the Presentence Report, based on the Sixth Amendment and *Blakely*. Petitioners specifically objected to the Supplement's use of mandatory Guidelines sentencing enhancements, increasing the penalty level far beyond the base offense

level, and asserted that such mandatory sentencing enhancements had not been admitted by Petitioners or found beyond a reasonable doubt by the jury, as required by *Blakely*.

Petitioners argued that any judicially imposed increase in the severity of their sentences, beyond the base offense level prescribed by the Guidelines, based upon fact-findings made only by a judge and not by the jury, and not admitted by Petitioners, would violate Petitioners' Sixth Amendment right to trial by jury. Petitioners maintained that they were entitled to be sentenced under the mandatory Guidelines in effect when the offenses were committed, and at the time of trial, and that the only constitutionally permissible sentences that could be imposed under the mandatory Guidelines then in effect and at trial, given the constitutional defect in the enhancements, were unenhanced, base-offense level sentences.

The day before resentencing, the Fifth Circuit decided *United States v. Pineiro*, 377 F.3d 464 (5 Cir. 2004), *vacated*, 543 U.S. 1101 (2005), *following remand*, 410 F.3d 282 (5 Cir. 2005). The Fifth Circuit in *Pineiro* mistakenly held that *Blakely* and the Sixth Amendment were not relevant to the Federal Guidelines' mandatory sentencing enhancements.

At resentencing, the trial judge acknowledged he had read *Pineiro* but ruled that decision was essentially irrelevant because of his conclusion that all Petitioners had *waived* their Sixth Amendment right to a jury determination of sentencing enhancement factors, by not asserting that right at the *original* sentencing or on appeal to the Fifth Circuit. The trial judge believed the law of

the case doctrine and the Fifth Circuit's decision in *United States v. Marmolejo*, 139 F.3d 528, 530-31 (5 Cir. 1998) compelled that result (R. 57: 27-30; following emphasis added):

> THE TRIAL COURT: And then the Blakely matter. This has been submitted by Mr. Jefferson in behalf of both Ms. Hamilton and Ms. Alice Miles, also submitted by Mr. Maness on behalf of Mr. Richard Miles.
>
> This, the Blakely matter in this [case] now becomes a matter for other courts to decide in view of the Fifth Circuit's decision in United States v. Pineiro, which was filed yesterday in the Fifth Circuit, in which the Fifth Circuit holds that it adheres to the position that the guidelines do not establish maximum sentences for precedent purposes.
>
> Accordingly I would in any event deny the motion or the objections based upon the decision in Blakely. But I would further, even apart from the Fifth Circuit decision, observe that those issues, if they were to have been made, objections were to have been made and preserved, *were required to be made at the original sentencing, not now*; that on re-sentencing the Court may not for the first time consider issues that are raised for the first time on the remand and are unrelated to the reason for the remand. And that is United

> States v. Marmolejo at 139 F3rd 528 [530-31 (5 Cir. 1998)].
>
> So, in any event, in this case, *those matters were waived originally* and are beyond the purview of what this Court is authorized to do (emphasis added).

The trial judge was wrong. Neither *United States v. Marmolejo*, 139 F.3d 528, 530-31 (5 Cir. 1998) nor any case on which the Government relied before the Fifth Circuit, nor other judicial decision in the history of the United States, employed the law of the case doctrine or the mandate rule, both discretionary, nonjurisdictional principles of appellate review, to sustain the imposition of an unconstitutional sentence, over a defense objection satisfying Federal Criminal Rules 32(f) and 51(b). The law of the case doctrine simply does not authorize, justify, or permit the imposition, over a defendant's objection, of a sentence that violates the defendant's constitutional right to trial by jury under the Sixth Amendment.

Relying upon the recommendations contained in the Supplement to the Presentence Report, the trial judge again imposed lengthy terms of imprisonment, based upon mandatory Guidelines enhancements that had not been admitted by Petitioners or found by the jury beyond a reasonable doubt.

On Petitioners' second appeal, the Fifth Circuit affirmed the sentences. *United States v. Hamilton*, 440 F.3d 693 (5 Cir. 2006) (Pet. App. A-1). The Fifth Circuit's opinion addressed two related but significantly different issues.

First, in Section II of its opinion, the Court of Appeals sustained the trial court's determination, not based on constitutional grounds, that Petitioners' renewed objection to the loss calculation used for mandatory sentencing enhancement purposes under the Guidelines was foreclosed by the mandate rule, a variant of the law of the case doctrine. *United States v. Hamilton*, 440 F.3d at 697-699 (Pet. App. at A-6). Under the mandate rule, an issue of fact or law outside the remand order of an appellate court "may not be reexamined either by the district court on remand or by the appellate court on a subsequent appeal." *United States v. Becerra*, 155 F.3d 740, 752 (5 Cir. 1998).

Section II of the Fifth Circuit's opinion is unexceptionable. Petitioners do not challenge Section I in this petition for certiorari.

Second, the Fifth Circuit held in Section III of its opinion that the mandate rule likewise foreclosed on remand Petitioners' Sixth Amendment *Blakely-Booker* claim — *that is, that the mandate rule either authorized or compelled the imposition of unconstitutional sentences, over Petitioners' Sixth Amendment objection.* Like the trial court, the Fifth Circuit thought that Petitioners had irrevocably *waived* that constitutional error by not raising it on the first appeal, 440 F.3d at 699, and that *Blakely* was not an intervening change in the law sufficient to avoid application of the mandate rule and the law of the case doctrine.

The Fifth Circuit acknowledged that, apart from what it thought was a "waiver" arising from the first appeal, the enhanced, mandatory Guidelines sentences imposed on Petitioners were unconstitutional and

violated Petitioners' Sixth Amendment right to trial by jury under *Booker*. 440 F.3d at 699 (Pet. App. at A-5). The Fifth Circuit likewise acknowledged that Petitioners had objected in the trial court to the unconstitutionality of the second sentences before they were imposed. 440 F.3d at 696 (Pet. App. at A-12).

Like the trial court, the Court of Appeals did not address or even mention Petitioners' contention that Federal Criminal Rule 23(a), providing that trial "must be by jury" unless the accused waives a jury in writing, foreclosed finding a "waiver." The Court of Appeals also did not address or decide Petitioners' claim that the *ex post facto* clause of the Constitution and the *ex post facto* component of the Fifth Amendment's due process clause forbid imposition of sentences more severe than the constitutionally permissible, unenhanced sentences that would have been imposed under the mandatory U. S. Sentencing Guidelines. Since the mandatory Guidelines are themselves constitutional, except when applied using sentencing enhancements that have not been admitted by a defendant or found beyond a reasonable doubt by a jury, Petitioners claimed that the Guidelines conferred on them a statutory right to be sentenced as unenhanced, base-level offenders, since none of the sentencing enhancement factors had been admitted by Petitioners or found beyond a reasonable doubt by a jury.

The Court of Appeals finally concluded that, despite Petitioners' undeniably correct Rule 51(a) written and oral objections before resentencing, *the sentences were reviewable only for plain error*, the standard of review prescribed by Federal Criminal Rule 52(b) when a defendant has failed to object or otherwise preserve an issue for appellate review in the trial court.

Using the plain error standard, the Court of Appeals affirmed all the sentences and denied a timely petition for panel rehearing. The Fifth Circuit did not attempt to explain how there could have been *any* error at all, "plain" or otherwise, in the second sentences if Petitioners had "waived" the Sixth Amendment error by not raising it on the first appeal.[1]

Petitioners emphatically disclaim any reliance whatever on Federal Criminal Rule 52(b) or the plain error standard of review. Petitioners did not "waive" anything. They complied with the Federal Criminal Rules by making clear, procedurally correct objections in the trial court to the unconstitutionality of their second sentences, orally and in writing, before the sentences were imposed. They were dead on target. In any system of federal criminal justice that has not gone completely over Niagara Falls in a rubber barrel, that should have been more than enough.

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[1] "The first limitation on appellate authority under Rule 52(b) is that there indeed be an 'error.' Deviation from a legal rule is 'error' unless the rule has been waived. For example, . . . [t]he right to trial is waivable, and because the defendant who enters a valid guilty plea waives that right, [the defendant's] conviction without a trial is not 'error'." *United States v. Olano*, 507 U.S. 725, 733 (1993). In view of the supposed "waiver" of Sixth Amendment rights in this case, the Fifth Circuit's "plain error" analysis is obviously "plain error."

## Reasons for Granting the Petition

**1. The Fifth Circuit mistakenly allowed the federal trial court to impose enhanced, concededly unconstitutional mandatory Guidelines sentences over Petitioners' well-founded Sixth Amendment and Rule 23(a) objections.**

This case is like something out of *Nightmare on Elm Street*. Or perhaps a particularly grotesque story by Kafka. The only thing missing is some sort of giant, loathsome insect.

The following is a fair and accurate summary of the Fifth Circuit's holding, in a single sentence that is not confusing, argumentative, slanted, or unfair. The Court of Appeals held that the law of the case doctrine and the mandate rule — discretionary, non-jurisdictional principles of federal appellate review[2] — authorized a federal trial court to find a "waiver" and to impose, over Petitioners' well-founded Sixth Amendment objection, unconstitutionally enhanced, mandatory federal Guidelines sentences that violated Petitioners' Sixth Amendment right to trial by jury, Rule 23(a) of the Federal Rules of Criminal Procedure, and the constitutional prohibitions against *ex post facto* laws.

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[2] *United States v. United States Smelting Refining & Mining Co.*, 339 U.S. 186, 199 (1950) (law of the case doctrine "is only a discretionary rule of practice"); *Messinger v. Anderson*, 225 U.S. 436, 444 (1912) (the phrase "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power").

The foregoing proposition may seem superficially plausible and persuasive, but only if the reader is either exceedingly drunk or has recently been lobotomized. The Supreme Court should grant certiorari because the Fifth Circuit has made an utter, unmitigated disaster of this case.

The following circumstances are not really disputable:

1. Petitioners never waived their Sixth Amendment right to trial by jury in the manner demanded by Federal Criminal Rule 23(a) — a written waiver by the defendant, approved by the Government, with the trial court's consent. Finding "waiver" in the manner adopted by the Fifth Circuit also violated Fifth Amendment due process, as well as Federal Criminal Rule 23(a), because no sensible person could have foreseen such a "waiver" in view of the clear, precise, and unconditional language of Rule 23. Absent a *written waiver* by the defendant, approved by the trial court and the Government, "trial must be by jury."

2. The jury did not find beyond a reasonable doubt, and Petitioners did not admit, any of the sentencing enhancements used by the trial judge to calculate the mandatory Guidelines sentences he imposed on Petitioners. Using those sentencing enhancements to impose mandatory Guidelines sentences was unconstitutional under the Sixth Amendment, but Petitioners' counsel did not make that argument the first time around, either in the trial court or on the first appeal to the Fifth Circuit.

3. In calculating the enhanced mandatory Guidelines sentences that were imposed, the trial judge mistakenly determined that Medicare was a "financial institution," a sentencing enhancement error that affected the calculation of all sentences of all Petitioners.

4. On the first appeal, the Fifth Circuit vacated all sentences after the Government conceded that Medicare is not a "financial institution" under the Guidelines.

5. Following remand, the U. S. Probation Department in Houston prepared a Supplemental Presentence Report, again recalculating all sentences based on sentencing enhancements not admitted by Petitioners or found by a jury beyond a reasonable doubt.

6. The Federal Criminal Rules gave Petitioners the right to file timely supplemental objections to the Supplemental Presentence Report. They did so, correctly contending that imposing mandatory Guidelines sentences using sentencing enhancements not admitted by Petitioners or found beyond a reasonable doubt by the jury would violate *Blakely* and the Sixth Amendment.

7. At the resentencing hearing, before imposing mandatory, enhanced, unconstitutional Guidelines sentences on all Petitioners, the trial judge announced that all Petitioners had *waived* their right to object to the unconstitutional sentences he was getting ready to impose because the law of the case doctrine and the mandate rule required those objections to have been made at the first sentencing hearing, and on the appeal to the Fifth Circuit.

8. On the second appeal the Fifth Circuit affirmed the sentences, mistakenly invoking Federal Criminal Rule 52's "plain error" standard of review. This was obviously wrong. If there were a waiver of Petitioners' Sixth Amendment rights, arising from the first appeal, then there was no error at all, "plain" or otherwise. *United States v. Olano,* 507 U.S. 725, 733 (1993).

For the following reasons, the Supreme Court should grant certiorari and set aside concededly unconstitutional sentences that obviously violated Federal Criminal Rule 23(a) and Petitioners' Sixth Amendment right to trial by jury.

*First*, for the first time and with any luck the last time in the history of the United States, a federal appeals court has affirmed unconstitutional sentences, imposing extended terms of imprisonment, *even though the defendants correctly objected that the sentences were unconstitutional before they were imposed.* There is simply no imaginable precedent or excuse for this sort of thing.

*Second*, the Federal Rules of Criminal Procedure conferred on Petitioners a right to object *after* the supposed "waiver" on the first appeal and *before* the second sentences were imposed. Federal Criminal Rule 32(f) expressly authorized all Petitioners to object in writing to the supplemental presentence report within 14 days after its receipt. All Petitioners did so, correctly objecting on *Blakely*-Sixth Amendment grounds. The Fifth Circuit acknowledged that they did.

*Third*, Federal Criminal Rule 32(h)(i)(D) even permits the trial court, "for good cause, [to] allow a party

*to make a new objection* [to the sentence] at any time before sentence is imposed" (emphasis added).

What an incredibly strange record *that* would have made (if it had happened, which it didn't):

> THE TRIAL COURT: I'm getting ready to impose mandatory Guidelines sentences using sentencing enhancements that were not admitted by the defendants or found by the jury. So, stand up, defendants, get a grip on yourselves, and I'll . . .
>
> MR. MANESS: Uh, Your Honor, pardon me. The . . .uh, mandatory, enhanced Guidelines sentences you're getting ready to impose will . . .uh, like, violate the defendants' . . . uh, like, you know, like, Sixth Amendment right to . . . like, umm, trial by jur— . . .
>
> THE TRIAL COURT (brusquely, raising hand): Uppp! Sorry, Mr. Maness, that's not "good cause" to allow an objection under Federal Criminal Rule 32(h)(i)(D). Your clients have already irrevocably waived their right to object on that basis by not raising it on the first appeal of the original sentences. I'm afraid I'll now have to impose these unconstitutional, enhanced, mandatory Guidelines sentences that violate the Sixth Amendment. And I think the Fifth Circuit will back me up on this. Anyway, wish I

> could help you, but my hands are tied. *Se la vie!*
>
> MR. MANESS (sighing dejectedly): Oh. Well, O.K.

*Fourth*, the constitutional defect in the *second* sentences could not have been addressed in the *first* appeal, which dealt only with entirely *different* sentences — the sentences initially imposed, then vacated on the first appeal. "Vacated" means "set aside," right? Petitioners could not have "waived" on the first appeal a constitutional error in later sentences that had not yet been imposed, right? Or are we missing something?

*Fifth*, in the absence of compliance with Rule 23(a)'s clear, straightforward, unambiguous language, "*trial must be by jury*." A defendant cannot "waive" a jury in any other manner, such as by failing to object or to appeal. Rule 23 does not obligate a federal criminal defendant or her counsel *to do anything* to obtain a jury determination. Unless she waives one, in the manner prescribed by Rule 23(a), she gets one.

Moreover, Rule 23(a) doesn't *require* an objection by a defendant to denial of a jury trial, because by its plain terms Rule 23(a) does not *permit* a jury to be waived by a defendant's failure to object or by other procedural default or in any other manner not authorized by Rule 23(a). Absent a Rule 23 waiver, whether the defendant asks for a jury trial or not, she gets one.

In the language of the Microsoft Corporation, the Rule 23(a) default setting is "jury trial." You want to change the default setting? Do a Rule 23 written waiver.

The screen will say "Jury Waiver Accepted." You want to change the default setting by invoking the law of the case doctrine or some other theory of "waiver"? The computer beeps three times and the screen gives you a flashing message that says "Rule 23 error. Call System Administrator at (202) 479-3211."

*Sixth*, *Blakely* and *Booker* imposed an intervening change in the law that foreclosed discretionary application of the mandate rule. In the Fifth Circuit the Government maintained, and the District Court and Court of Appeals apparently agreed, that there had been no intervening change because the Fifth Circuit mistakenly refused to recognize *Blakely's* application to mandatory federal Guidelines sentencing. But *Booker* did, and *Booker* by its own terms is retroactively applicable to the sentences in this case, just as if it had been decided the day before resentencing. Since *Booker* governed the second sentencing, the law had changed since the first sentencing, and no variant of the law of the case doctrine could be invoked.[3]

*Seventh*, since the mandate rule is a discretionary, non-jurisdictional principle, a judge does not have to invoke it unless there's a good reason for doing so. A discretionary, non-jurisdictional principle of federal appellate review cannot justify imposition of unconstitutional sentences. At least not without administering powerful, mind-altering drugs.

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[3] "There is no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue in [Blakely]." *United States v. Booker*, 543 U. S. 220, 233 (2005).

*Eighth*, the law of the case doctrine incorporates a recognized exception: it will not be invoked when to do so would result in an injustice. Sustaining an unconstitutional sentence that violates a defendant's Sixth Amendment right to trial by jury, over the defendant's objection, may not seem "unjust," but only if one has completely lost one's mind.

Petitioners and their counsel deserve better than this. The people of the United States of America deserve better than this. Our constitutional system of principled judicial decision-making deserves better than this. The Supreme Court should grant certiorari because the Fifth Circuit fumbled the pass, dropped the ball, and went way out of bounds on this one. Its half-baked decision of important constitutional questions in this case is appalling, shameful, disgraceful, and absurd. If we as advocates, law clerks, and judges can't do any better than this, we'd better all give it up and go to work at Burger King.

**2. The Constitution's *ex post facto* clause, and the *ex post facto* component of the Fifth Amendment's due process clause, forbid imposition of "reasonable" discretionary sentences under *United States v. Booker*, 543 U.S. 220 (2005) that are more onerous than those that would have been imposed under the mandatory Guidelines.**

By its terms the *ex post facto* clause of the Constitution applies only to legislative enactments. *Lynch v. Mathis*, 519 U.S. 433, 441 (1997). However, the Supreme Court has held that retroactive increases in punishment resulting from application of sentencing guidelines violate the *ex post facto* clause. *Miller v.*

*Florida*, 482 U.S. 423, 433-35 (1987). The date of commission of the offense is determinative. *Dobbert v. Florida*, 432 U.S. 282, 297-98 (1977). The ending date of the offenses alleged in this case was June 1998, well before *Blakely-Booker*.

Accordingly, Petitioners' sentences cannot exceed the maximum, unenhanced, mandatory Guidelines sentences that could constitutionally have been imposed before *Blakely* and *Booker*.

In *Booker* the Supreme Court remedial majority judicially rewrote the Guidelines by striking two otherwise constitutional statutory provisions, 18 U.S.C. § 3553(b)(1) (making mandatory a sentence within the applicable Guidelines range, absent grounds justifying a departure), and 18 U.S.C. § 3742(e) (that set forth standards for *de novo* appellate review of mandatory Guidelines sentences). Thus, as they stand today, the reengineered Guidelines, having the force and effect of statutes, *Mistretta v. United States*, 488 U.S. 361, 367 (1989), would allow longer, more severe sentences to confinement to be imposed on Petitioners than those which would have been allowable under the mandatory Guidelines. Sentences to confinement longer than unenhanced, base offense level sentences under the mandatory Guidelines would violate the *ex post facto* clause.

The cases that govern this claim are *Miller v. Florida*, 482 U.S. 423, 432 (1987), *Weaver v. Graham*, 450 U.S. 24 (1981), and *Lindsey v. Washington*, 301 U.S. 397, 401-02 (1937). Application of *Booker*'s discretionary sentencing regime would "substantially disadvantage" Petitioners. Under the mandatory

Guidelines, Petitioners would have received only unenhanced, based-level offense sentences, because none of the enhancements factors were admitted or found by a jury. Without the enhancements, the Guidelines' base level provided the statutory maximum term of imprisonment. Moreover, "one is not barred from challenging a change in the [law] on ex post facto grounds simply because the sentence he received under the new law was not more onerous than that which he might have received under the old." *Dobbert v. Florida,* 432 U.S. 282, 300 (1977).

Even if the retooled Guidelines were deemed to be *judicial* rule-making rather than *legislative* action (and such an interpretation would raise profoundly serious separation-of-powers concerns under Article III), the *ex post facto* component of the Fifth Amendment's due process clause still would condemn resentencing Petitioners to a longer term of imprisonment than they could have received under the mandatory Guidelines. *Rogers v. Tennessee*, 532 U.S. 451, 460 (2001); *Proctor v. Cockrell*, 283 F.3d 726, 730-31 (5 Cir. 2002). Two considerations are relevant.

First, the simple, straightforward, immensely appealing position of the four dissenting Justices in *Rogers v. Tennessee*, 532 U.S. at 467-69 comes into play here: if a legislature is barred by the *ex post facto* clause from enacting a law that punishes a crime more severely than when it was committed, a court "is barred by the Due Process Clause from achieving precisely the same result by judicial construction," quoting *Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964). That would be a logical and coherent principle to govern cases such as this one.

Second, the retroactive change or abolition of a judicial interpretation of a legislative act that disadvantages a criminal defendant violates the fair notice requirement of Fifth Amendment due process if the abrogation was "unexpected" or "indefensible." No living human being outside the Supreme Court of the United States, including any federal judge, could have predicted the "remedial majority opinion" in *Booker*.

Accordingly, the retroactive application of *Booker's* novel, unexpected discretionary sentencing procedures to Petitioners, to impose a sentence greater than the unenhanced base level offense sentence they could have received under the mandatory Guidelines would violate their Fifth Amendment right to fair notice under the due process clause. Petitioners' sentences should be vacated and the case remanded for imposition of concurrent sentences no more severe than the base offense level sentences — the only constitutionally permissible sentences authorized by *Booker* and the mandatory Guidelines.

## Conclusion

For the foregoing reasons, the Supreme Court should grant the petition for certiorari.

Respectfully submitted,

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**Appendix**

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

Carrie HAMILTON, Richard Miles, and
Alice Miles,

Defendants-Appellants.

**No. 04-20616**

Feb. 16, 2006
Rehearing Denied March 21, 2006

Appeals from the United States District Court for the Southern District of Texas, Houston Division

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:

Defendants-Appellants Carrie Hamilton, Richard Miles, and Alice Miles (the "Appellants") appeal their sentences, arguing the district court erred in calculating their sentences by erroneously relying upon the mandate rule on remand and by violating *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005). Finding no reversible error, we AFFIRM.

I.

Four defendants, Carrie Hamilton, Richard Miles, Alice Miles, and Harold Miles, were charged in a 32-count indictment with crimes related to their involvement in a Medicare fraud scheme, surrounding the creation and management of Affiliated Professional Home Health (APRO). Texas's Department of Health certified APRO as a Medicare provider, and APRO began in-home treatment of Medicare-covered patients and to obtain reimbursement for the home visits to those patients.

The Grand Jury charged the three Defendants who now appeal, Carrie Hamilton ("Hamilton"), Richard Miles, and Alice Miles with: (1) conspiracy to defraud the United States in Medicare program reimbursements, 18 U.S.C. § 371; (2) structuring currency transactions, 31 U.S.C. § 5324; (3) money laundering conspiracy, 18 U.S.C. § 1956(h); (4) three counts of mail fraud, 18 U.S.C. § 1341; (5) health care fraud, 18 U.S.C. § 1347; (6) six counts of money laundering promotion, 18 U.S.C. § 1956 (a) (1) (A)(i); (7) seven counts of money laundering concealment, 18 U.S.C. § 1956 (a) (1) (B) (i); and (8) ten counts of illegal remunerations involving a federal health care program, 42 U.S.C. § 1320a-7b (b) (2) (A).[1]

Appellants were convicted on various counts and were sentenced as follows. Richard Miles was sentenced

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[1] Harold Miles, who is not a party to this appeal, was charged only with three counts of mail fraud, one count of health care fraud, and six counts of money laundering promotion. Harold Miles was acquitted. All four defendants were subject to criminal forfeiture. *See* 18 U.S.C. § 982.

to 97 months' imprisonment, three years' supervised release, and a $200 special assessment. Alice Miles was sentenced to 168 months' imprisonment, three years' supervised release, and a $2100 special assessment. Hamilton was sentenced to 204 months' imprisonment, three years' supervised release, and a $2100 special assessment. Appellants were ordered jointly and severally to make restitution to the United States of $4,292,246.72.

Appellants challenged the convictions and sentences in their first appeal. Reversing in part the convictions, a panel of this Court remanded the case for resentencing. *United States v. Miles*, 360 F.3d 472 (5th Cir. 2004) (reversing the convictions for Hamilton and Alice Miles on money laundering promotion and for ten counts for illegal healthcare kickbacks). Hamilton's and Alice Miles's convictions for conspiracy to commit money laundering and for money laundering concealment were affirmed. *Id.* at 479. Appellants argued in *Miles* that the district court erred in the method of calculating the amount of loss and that the court erred in enhancing their sentences under USSG § 2B1.1(b) (12) (A) (2001) because Medicare is not a financial institution within the meaning of that guideline. Agreeing in part, the panel vacated the sentences and remanded for resentencing, as follows:

> [W]e vacate the sentences of all three appellants and remand for resentencing on the ground that Medicare is not a 'financial institution' within the meaning of U.S.S.G. § 2B1.1(b)(12)(A), in addition to resentencing based on the reversal of the convictions noted above. *On all other grounds, we affirm the rulings of the district court, the jury verdict,*

> *and the other bases for the sentences imposed by the district court.*

*Id.* at 483 (emphasis added).

On remand, the Probation Office submitted a supplemental and amended Presentence Report (the "Supplemental PSR"), noting the effect of this Court's opinion in *Miles* on both the sentencing ranges and the amount of loss calculation. The Supplemental PSR recommended a total loss figure of $4,266,246.74, a reduction from the original of $26,000 (the amount attributable to the kickback counts).

On June 24, 2004, the Supreme Court issued *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). Appellants filed a supplemental sentencing memorandum, arguing *Blakely* precluded the enhancement of their sentences based upon facts not found by jury.[2]

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[2] Hamilton objected to the following enhancements: +18 for total loss; +2 for commission of sophisticated laundering; +4 for being a leader/organizer of criminal activity; and +2 for obstruction of justice.

Alice Miles objected to enhancements of: +18 for total loss; +2 for commission of sophisticated laundering; +2 for 2S1.1 (b) (2) (B); +3 for § 3B1.1 (b); +3 for obstruction of justice.

Richard Miles objected to the following level increases: +2 for considerable planning over an extended time period; +3 for his role as a manager/supervisor of criminal activities that involved five or more participants; and +2 for committing perjury during trial.

On July 12, 2004, the Fifth Circuit issued *United States v. Pineiro*, 377 F.3d 464 (5th Cir. 2004) (*Pineiro I*) (rejecting *Blakely*'s application to the federal sentencing guidelines), *vacated by*, 543 U.S. 1101 (2005).

Subsequently, the district court resentenced Appellants. At oral argument, Appellants again objected to the enhancements on the basis of *Blakely*. The district court rejected this argument based upon both *Pineiro I* and Appellants' waiver of the objection. The district court stated that Appellants failed to preserve the issue by failing to raise it before this Court on initial appeal. Defense counsel stated that the Sixth Amendment objection had been made at initial sentencing. The district court then ruled that, in addition to *Pineiro I,* the challenge was waived by failure to preserve the issue on appeal and the scope of the issues viable for consideration on remand. See *United States v. Marmolejo*, 139 F.3d 528 (5th Cir. 1998).

Hamilton was resentenced to 171 months' imprisonment, three years' supervised release, and a $1050 special assessment. Richard Miles was resentenced to 63 months' imprisonment, three years' supervised release, and a $200 special assessment. Alice Miles was resentenced to 135 months' imprisonment, three years' supervised release, and a $1050 special assessment. With respect to the amount of loss, the district court reduced the restitution

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All three objected to the loss calculation of the grounds that it was (1) determined by subtracting the $26,000 related to the reversed kickback conviction from the district court's original calculation; (2) not alleged in the indictment; and (3) not admitted to by defendants or determined by a jury.

order, in accordance with the probation recommendations, ordering restitution in the amount of $4,266,246.74. Appellants timely appealed again, challenging their sentences, including the calculation of loss amount.

II

A.

Appellants challenge the district court's calculation of loss amount, arguing that the court reversibly erred by relying upon *Marmolejo's* mandate rule in declining to revisit the method of the calculation of loss. "Whether the law of the case doctrine foreclosed the district court's exercise of discretion on remand and the interpretation of the scope of this court's remand order present questions of law that this court reviews *de novo*." *United States v. Lee (Lee II)*, 358 F.3d 315, 320 (5th Cir. 2004) (citing Sobley v. So. Nat. Gas Co., 302 F.3d 325, 332 (5th Cir. 2002)).

B.

Appellants argue, as they did at trial, on initial appeal, and on resentencing, that the court erroneously calculated the amount of restitution by improperly including profits lawfully obtained. This objection is not based upon the Sixth Amendment jury trial right but rather upon the method of calculation. The Government argues that under the law of the case, an issue of law or fact outside the mandate of the remand order "may not be reexamined either by the district court on remand or by the appellate court on a subsequent appeal" and that no exception to the mandate rule applies to this record.

See *United States v. Becerra*, 155 F.3d 740, 752 (5th Cir. 1998).

> The scope of the mandate on remand for resentencing is limited, precluding a district court's *de novo* consideration of issues at resentencing. *Marmolejo*, 139 F.3d at 528. In *Marmolejo*, we affirmed the district court's exclusion of evidence newly presented on remand for resentencing because the "determination was not before the district court on remand." *Id.* at 530-31. Accordingly, defendants must "raise all relevant and appealable issues at the original sentencing," and a district court resentencing on remand must determine the scope of the mandate by identifying "those issues arising out of the correction of the sentence ordered by this court," not by "allowing a defendant to revisit issues with the benefit of this court's opinion." *Id.* at 531.
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> [T]he resentencing court can consider whatever this court directs - no more, no less. All other issues not arising out of this court's ruling and not raised before the appeals court, which could have been brought in the original appeal, are not proper for reconsideration by the district court below.

*Id.*

Three exceptions to this discretionary, rather than jurisdictional, mandate rule exist. *See Becerra*, 155 F.3d at 752-53. These exceptions are: "(1) The evidence at a subsequent trial is substantially different; (2) there has been an intervening change of law by a controlling authority; and (3) the earlier decision is clearly erroneous and would work a manifest injustice." *United States v. Matthews*, 312 F.3d 652, 657 (5th Cir. 2002) (Matthews II) (citing *Becerra,* 155 F.3d at 752-53).

Here, the district court properly concluded that the mandate rule foreclosed any reconsideration of the amount of loss calculation except to adjust as required by *Miles's* reversal of the money laundering promotion and illegal remuneration convictions. This adjustment was recommended by the Supplemental PSR and adopted by the district court. Appellants' argument that the district court and the panel in *Miles* all failed to properly calculate the loss amount because the calculation included lawfully obtained proceeds was not properly before the district court on remand. The issue was presented to the *Miles* panel, fully briefed and argued, and rejected. The method of calculating the loss amount was not included within the scope of the remand order, given the general language affirming the remainder of the district court's bases for sentencing as well as this Court's rejection of the "various other issues raised by the appellants." *See Miles*, 360 F.3d at 483. Despite Appellants' characterization to the contrary, the mandate in *Miles* expressly affirmed the amount of loss calculation. The *Miles* panel stated, "[o]n all other grounds, we affirm the rulings of the district court, the jury verdict, and the other bases for the sentences imposed by the district court." *Id.* Moreover, *Miles* noted the amount of loss figure in the context of its discussion of Appellants'

fraudulent, not lawful, conduct. "The APRO defendants engaged in a wide range of activities that fraudulently overcharged Medicare and netted them a substantial amount of illicit revenue. The appellants were held jointly and severally liable for restitution of over $4 million in overcharges to Medicare." *Id.* at 478. The amount of loss with respect to these overcharges was affirmed by the *Miles* panel, and neither the district court on remand nor this panel may reconsider that law of this case.

Appellants argue that the intervening change in law of *Blakely* and *Booker* precludes application of the mandate rule. The Government argues that at the time Appellants were resentenced by the district court there had been no intervening change in law. The Government argues *Blakely's* application of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to state sentencing schemes is insufficient to serve as the "controlling authority" required to trigger the intervening authority exception to the mandate rule.

In *Matthews II*, the defendant had argued on initial appeal of his sentence, based on a carjacking and conspiracy conviction, the position that was subsequently adopted in *Apprendi*. 312 F.3d at 656. On remand to the district court, defendant argued that *Apprendi* was an intervening change of law, overruling this Court's prior holding on his initial appeal. *Id.* The district court disagreed and resentenced him according to the government's recommendations. On second appeal, Matthews argued the mandate rule permitted the district court to reconsider the enhancement on one conviction (which, upon reconsideration, the district court had not applied) and prohibited consideration of the enhancement as to another. *Id.* The panel concluded that *Apprendi* was an intervening change in controlling

law that "overruled our [initial panel] decision affirming [the] enhancement." *Id.* at 657.

The holding of *Apprendi*, 530 U.S. at 490, forms the basis for both *Blakely*, 124 S. Ct. at 2537, and *Booker*, 125 S. Ct. at 753, 756. As the Government argues, Appellants here did not anticipate this error, as did the defendant in *Matthews I*, nor argue at initial sentencing and on initial appeal that the facts supporting enhancement must be charged in the indictment and proven to a jury as required by the Fifth and Sixth Amendments. *See Matthews II*, 312 F.3d at 657 (quoting *Matthews I*, 178 F.3d at 302). This Circuit's law following *Blakely* and *Booker* also indicates that *Blakely's* issuance prior to Appellants' resentencing was not an intervening change in law such that an exception to *Marmolejo* should apply. *See United States v. Malveaux*, 411 F.3d 558, 560-61 (5th Cir.), *cert. denied*, 123 . Ct. 194 (2005); *United States v. Mares*, 402 F.3d 511, 518-19 (5th Cir.), cert. denied, 126 S. Ct. 43 (2005); *see also United States v. Higginbotham*, 137 Fed. Appx. 665 (5th Cir.) (per curiam) (refusing to consider *Booker* error where defendant failed to raise the claim in his initial appeal and raised the challenge for the first time in his petition for certiorari), *cert. denied*, 126 S. Ct. 498 (2005).

Appellants have not shown that an exception applies to the mandate rule to permit the district court's or this panel's reconsideration of the loss amount. *Blakely's* issuance between initial appeal of this cause and resentencing on remand is not an intervening change in law sufficient to trigger that exception to the mandate rule. Accordingly, we affirm the Appellants' sentences, including the calculation of restitution, essentially for the reasons provided by the district court.

III

A.

Appellants also argue that the district court erred in sentencing by improperly relying upon facts not found by a jury or admitted, in violation of *Booker*. Citing *Chapman v. California*, 386 U.S. 18, 24 (1967), Appellants argue that harmless error applies to our review of this issue because they preserved their challenge by raising a Sixth Amendment challenge at initial sentencing and that their failure to raise the issue on initial appeal does not eviscerate this preservation. The Government argues that plain error applies because Appellants failed to preserve their challenge grounded in the Sixth Amendment by waiving the issue on first appeal.

Addressing both the mandate rule and preservation, we have previously held that the mandate rule did not foreclose reconsideration of sentencing to allow the application of an upward departure when "the issue was not waived in the prior appeal and...arose out of the correction of the sentence of this court [on initial appeal]." *Lee II*, 358 F.3d at 320 n.3, 323-24. Such is not the case here where any objection originally raised grounded on the Sixth Amendment was waived when Appellants abandoned the argument on initial appeal to this Court. *See id.* (citing, amongst others, *United States v. Hass*, 199 F.3d 749, 753 (5th Cir. 1999)). Appellants' argument that to raise *Apprendi* at the time of sentencing or on appeal would have been futile is not availing. See *United States v. Akpan*, 407 F.3d 360, 376 (5th Cir. 2005). We review Appellants' sentences for plain error.

B.

Appellants bear the burden of showing plain error. *See* FED. R. CRIM. P. 52(b); *Mares*, 402 F.3d at 521. The parties agree that the district court plainly erred by increasing Appellants' sentences on the basis of facts other than prior convictions not alleged in the indictment, admitted by Appellants, or proven to a jury beyond a reasonable doubt. It is now clear that the district court's reliance on *Pineiro I* to deny Appellants' challenge to the enhancements and loss amount was error that is plain. *Mares*, 402 F.3d at 520; see also *Booker*, 125 S. Ct. at 738; *Johnson v. United States*, 520 U.S. 461, 468 (1997).

Thus, in order to show reversible error, Appellants must show that the plain error affected their "substantial rights." See *Mares*, 402 F.3d at 520 (citing *United States v. Cotton*, 535 U.S. 625, 631 (2002)). To do so, Appellants must show that the error "affected the outcome of the district court proceedings." *United States v. Olano*, 507 U.S. 725, 734 (1993).

The transcript of the sentencing hearing indicates that the district court made no suggestion of an inclination to sentence outside the Guidelines or hint of constraint to sentence within them. There is no statement by the district court judge to indicate what he might have done were the Guidelines not mandatory. Thus, "[w]e do not know what the trial judge would have done had the Guidelines been advisory." *Mares*, 402 F.3d at 522. And, on such a record, Appellants cannot show that the district court, sentencing under an advisory scheme, "would have reached a significantly different result." *Id.*

Appellants cannot demonstrate plain error on this record.

IV.

For the foregoing reasons, we AFFIRM Appellants' sentences essentially for the reasons provided by the district court and because Appellants cannot demonstrate that the court plainly erred under *Booker*.

AFFIRMED.

**Order Denying Petition for Rehearing**

Petitioner-Appellant Richard Miles' Petition for Panel Rehearing is DENIED.

SO ORDERED this 21st day of March, 2006.